Supreme Court, U.S.
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No. 02-277

IN THE

Supreme Court of the United States

JAMES K. HAVEMAN, JR., Director,
Michigan Department of Community Health,

Petitioner,

v.

WESTSIDE MOTHERS,
a Michigan Welfare Rights Organization, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit correctly "reverse[d] on all issues presented" an order of a district court which dismissed plaintiffs' Complaint based on the district court's holding that Title XIX of the Social Security Act is not Supreme federal law, enforceable in federal court.

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COUNTER-STATEMENT OF THE STATUTES INVOLVED

Petitioner omits from his Statement (Pet. at 1-2) and from his Appendix (112a-144a) four of the five provisions of Title XIX of the Social Security Act which have routinely been held to create rights for the children enrolled in Medical Assistance, their families and organizations of pediatric professionals who serve them. The Court of Appeals for the Sixth Circuit specifically grounded its holdings in the omitted provisions. (App. 17a-18a, 19a). Two omitted provisions, 42 U.S.C. § 1396a(a)(8) and § 1396a(a)(10)(A), say:

> A State plan for medical assistance must . . .
>
> (8) provide . . . that such assistance shall be furnished with reasonable promptness to all eligible individuals;
>
> (10) provide —
>
> > (A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of Section 1396d(a) of this title, to — (i) all individuals . . . [who are eligible].

The "care and services" referred to in § 1396a(a)(10)(A) and made mandatory upon participating States are specified in the third provision that Petitioner omits, 42 U.S.C. § 1396d(a)(4)(B). It says:

> The term "medical assistance" means payment of part or all of the cost of the following care and

> services . . . — (4) . . . — (B) early and periodic screening, diagnostic, and treatment services (as defined in subsection (r) of this section) for individuals who are eligible under the plan and are under the age of 21; . . . .

Petitioner does cite and append 42 U.S.C. § 1396d(r), entitled "Early and periodic screening, diagnostic, and treatment services." This section details the healthcare services to which each eligible child is entitled. (App. 122a-124a).[1] Petitioner omits also the fifth provision of Title XIX, on which the Court of Appeals' decision is grounded (App. 19a), 42 U.S.C. § 1396a(a)(30)(A). It says:

> A State plan for medical assistance must — (30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available . . . as may be necessary . . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area; . . . .

COUNTER-STATEMENT OF THE CASE

1. Petitioner asks the Court to review the unanimous decision of a panel of the Court of Appeals for the Sixth Circuit composed of Judges Danny J. Boggs, Karen Nelson Moore, and former Chief Judge Gilbert S. Merritt. The opinion, written by Judge Merritt, reversed "on all issues presented"

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1. While Petitioner cites and appends §§ 1396a(a)(43), 1396c and others, the Court of Appeals did not rest its decision upon them. (App. 17a-18a, 19a).

a 95-page district court decision which had departed from the accepted and usual course of judicial proceedings to dismiss a commonly adjudicated claim for prospective injunctive relief to obtain the delivery of children's healthcare as required by Title XIX of the Social Security Act of the United States and 42 U.S.C. § 1983.

2. Respondents allege that Petitioner failed to provide healthcare benefits to children as required, inter alia, alleging violations of Sections 1396a(a)(8), 1396a(a)(10)(A), 1396a(a)(30)(A), 1396d(a)(4)(B), and 1396d(r) of Title XIX of the Social Security Act, known as Medicaid. Medicaid is a 37-year old federal-state cooperative funding program. Participation in the program is voluntary, but once a state decides to accept federal funds, the requirements of the statute become binding on the state. Each state is required to submit a state plan which acknowledges the binding obligations.

In 1967, Congress amended Medicaid to impose the explicit and mandatory children's healthcare benefit upon every state choosing to accept federal Title XIX funds. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, 1967 U.S.C.C.A.N. (81 Stat. 821) 923. In 1989, Congress expanded the income criteria for eligibility upward from public assistance levels to include all poor children and children in families with incomes up to 133% of poverty level for most ages and 185% for infants. At the same time, Congress statutorily specified the required elements of the children's healthcare benefit in 42 U.S.C. § 1396d(r). *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 1989 U.S.C.C.A.N. (103 Stat.) 2262-2263. Title XIX refers to the children's healthcare benefits as "early and periodic screening, diagnostic and treatment services," sometimes abbreviated as EPSDT.

"The EPSDT benefit is, in effect, the nation's largest preventive health program for children." H.R. Rep. No. 101-247, at 398-401 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2124-27. Today, some 20.7 million children have been determined by the States to be eligible and have been enrolled in EPSDT; one out of every four children in the nation. *See* Kaiser Commission on Medicaid and the Uninsured, *The Medicaid Program at a Glance* (January 2001), *available at* www.kff.org/content/2001/2004b. Michigan has determined that approximately 800,000 children are eligible for EPSDT and have been enrolled therein. (Compl. at ¶ 37, App. 163a).[2]

3. The district court dismissed the Complaint on grounds *not* raised or argued by the defendants. (Petitioner admits this fact at page 4 of the Petition.) Instead, the district court premised its various rulings upon its erroneous conclusion that because Congress enacted Title XIX of the Social Security Act under its Spending Clause powers, that statute is not Supreme federal law. (*See, e.g.*, App. 40a-44a). The district court relied upon this holding to reach the further

2. States self report on annual basis: (i) the numbers of children the states have determined to be eligible for EPSDT and thus have enrolled; (ii) the numbers of eligible children who have received at least one required comprehensive examination; and (iii) the number of eligible children who have received dental services. *See* instructions located at http://cms.hhs.gov/medicaid/epsdt/416inst.asp. Petitioner's self-reports, uncontradicted, show that from FFY 1995 to FFY 1997, the number and proportion of enrolled children who received health care declined. (Compl. at ¶¶ 42, 46; App. 165a-167a). By FFY 1997, 64.7% of the children due under Michigan's periodicity schedule to receive in that year at least one comprehensive medical examination were *not* furnished *any* examination. (Compl. at ¶ 43, App. 165a). Three quarters of the children due for dental assessments in that year did *not* receive *any* assessment. (Compl. at ¶ 47, App. 166a-167a).

conclusions that: (1) the exception to sovereign immunity afforded by *Ex parte Young*, 209 U.S. 123 (1908) applies only to Supreme federal law and, therefore, not to this case (*See, e.g.*, App. 56a); and (2) 42 U.S.C. § 1983 provides a cause of action only for violations of Supreme federal law and, therefore, not to these plaintiffs. (*See, e.g.*, App. 82a). The district court also held that while not Supreme federal law, Title XIX of the Social Security Act is no more than a contract, unenforceable for reasons including an analysis of 19th century third party beneficiaries (App. 77a-82a) and the common law of states' sovereign immunity as of 1871. (App. 73a-77a). Finally, the district court held *Ex parte Young* inapplicable for a series of additional reasons, including that Title XIX created a detailed remedial scheme (App. 67a-69a) and that the state is the real party in interest. (App. 44a-66a).

4. A broad set of healthcare providers, charitable organizations, local government officials, and others submitted *amicus curiae* briefs to the Court of Appeals urging reversal. Some of these parties included the American Academy of Pediatrics, the American Academy of Pediatric Dentists, the American Hospital Association, the National Association of Public Hospitals and Health Systems, the Catholic Hospital Association of the United States, the National Association of Children's Hospitals, the National Association of Community Health Centers, the Association of American Medical Colleges, the March of Dimes Birth Defect Foundation, Catholic Charities USA, American Association of Retired Persons and the City of Detroit. Amici participating in one brief alone stated that they represent "virtually every hospital and health system in the country — public, private, non-profit, for-profit, children's hospitals, teaching hospitals, etc."

5. The Solicitor General also filed a Brief Amicus Curiae Supporting Reversal. The United States stated its interest in this case arose because the district court's opinion "is at odds with a long line of Supreme Court cases and would significantly limit the effectiveness of Congress's spending power." Br. at 1. At the invitation of the Sixth Circuit, the United States subsequently intervened as a party and participated in oral argument, urging reversal of the district court's opinion. In *Gonzaga Univ. v. Doe*, __ U.S. __, 122 S. Ct. 2268 (2002), the United States supported petitioners, but asked that the Court reject the *Gonzaga* petitioner's arguments to the full extent they were based on the district court's opinion in *Westside Mothers*. Brief for the United States as Amicus Curiae Supporting Petitioners at 18-23, *Gonzaga Univ. v. Doe*, __ U.S. __, 122 S. Ct. 2268 (2002) (No. 01-679) (Argument, Section A.3., entitled "An Analogy to Nineteenth Century Contract Law Is Not an Appropriate Basis for Refusing to Recognize Substantive Rights Enforceable Under Section 1983").

6. In the courts below and here, Respondents and Petitioner have agreed that whether a statute is enforceable under 42 U.S.C. § 1983 is determined by the criteria in this Court's opinion in *Blessing v. Freestone*, 520 U.S. 329 (1997), as subsequently confirmed by the Court's opinion in *Gonzaga*. (Pet. at 4, 6). The district court assumed, but did not decide, that the children's healthcare provisions at issue here are intended to benefit the plaintiffs. (App. 70a). The Court of Appeals applied this settled law and held that the provisions of Title XIX, which clearly and unambiguously mandate children's healthcare, are enforceable by the children, their families and their professional providers. (App. 16a-18a, 19a).

REASONS FOR DENYING THE PETITION

1. There is no split among the circuits with respect to the unanimous Sixth Circuit opinion which reversed the district court's opinion "on all issues presented." (App. 7a). Every aspect of the district court's decision has been unanimously and decisively rejected by unanimous panels of each of the other Courts of Appeals and by every district court to which it has subsequently been presented.

In the Fourth Circuit, a unanimous panel rejected the Supremacy Clause and *Ex parte Young* arguments based in the district court's holdings, finding them "novel" and "at odds with existing precedent." *Antrican v. Odom et al.*, 290 F.3d 178, 188 (4th Cir. 2002) (Niemeyer & Hamilton, JJ. and Raymond A. Jackson, District Judge, sitting by designation). Instead, the Fourth Circuit affirmed the decision of District Judge Malcolm Howard which had denied a motion to dismiss on the same *Westside Mothers* grounds. On October 21, 2002, this Court denied the defendants' petition for certiorari. *See Odom v. Antrican*, No. 02-220, 71 U.S.L.W. 3138, 2002 WL 1906621 (U.S. Oct. 21, 2002).

A Fifth Circuit panel in *Frazar v. Gilbert*, 300 F.3d 530, 550-51 & n.109 (5th Cir. 2002) (Reavley, Smith & Dennis, JJ.), unanimously rejected the *Westside Mothers* holdings, finding "none of them persuasive." An Eighth Circuit panel in *Mo. Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002) (Bowman, Riley & Melloy, JJ.), "found no . . . decision in which any federal court of appeals has held" as the *Westside Mothers'* district court did and unanimously held "we agree with the Sixth Circuit's reasoned rejection of this argument and likewise reject [it] here." *See also Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 171 n.10 (3d Cir. 2002) (quoting and adopting this Sixth Circuit and the above Fourth Circuit opinions).

2. This Court has recently reaffirmed its analysis for determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit: "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon v. Pub. Serv. Comm'n of Md.*, __ U.S. __, 122 S. Ct. 1753, 1760 (2002) (Scalia, J.) (citations omitted) (unanimous). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293, 296 (O'Connor, J. joined by Scalia and Thomas, JJ., concurring in part, concurring in judgment) (1997) ("the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause") (*quoting Green v. Mansour*, 474 U.S. 64, 68, (1985)); *see also Coeur d'Alene*, 521 U.S. at 298-299 (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989), invoked by the Sixth Circuit below (App. 13a), and in *Telespectrum, Inc. v. Pub. Serv. Com'n of Ky.*, 227 F.3d 414, 419 (6th Cir. 2000).

3. This Court also has noted, and rejected, that aspect of the district court's opinion which holds that Spending Clause legislation is, in fact, a contract subject to the common law of contracts. In another recent unanimous opinion, *Barnes v. Gorman*, __ U.S. __, 122 S. Ct. 2097, 2102 n.2 (2002), Justice Scalia wrote "We do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise."[3] *See also Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983)

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3. *Barnes v. Gorman* held that punitive damages may not be awarded in suits under the ADA and the Rehabilitation Act. Nearly all of the cases invoked by Petitioner also concern damages, not prospective injunctive remedies. (*See, e.g.*, Pet. at 10).

(O'Connor, J.), citing the Spending Power cases[4], where the unanimous Court noted that:

> Requiring states to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The state chose to participate in the . . . program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions. . . . If the conditions were valid, the state had no sovereign right to retain funds without complying with those conditions.

In *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985) (O'Connor, J.), also a unanimous decision and also applying *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (*Pennhurst I*), the Court "agree[s] with the state that . . . grant agreements [have] a contractual aspect," rejects a contractual axiom that a contract be construed against its writer and holds:

> the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction . . . Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.

Bennett, 470 U.S. at 669 (citations omitted). *See also* the Court's comprehensive examination of the Spending Power in *South Dakota v. Dole*, 483 U.S. 203 (1987) (Rehnquist, C.J.).

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4. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Quern v. Mandley*, 436 U.S. 725, 734 (1978); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *Oklahoma v. U.S. Civil Serv. Com'n*, 330 U.S. 127, 143-44 (1947).

4. The Court of Appeals correctly and unexceptionally applied the three-pronged test of *Blessing v. Freestone*, 520 U.S. 329 (1997) (as confirmed again by the Court's opinion in *Gonzaga Univ. v. Doe*, __ U.S. __, 122 S. Ct. 2268 (2002))[5] to hold Title XIX's children healthcare provisions enforceable under § 1983. The Court of Appeals correctly noted that the test requires the statute to meet the following requirements: (1) the provisions clearly and unambiguously intend certain entitlements to be furnished by the states to benefit individual children; (2) they are not vague and amorphous as not to be capable of judicial enforcement; (3) they are mandatory; and (4) there is no comprehensive remedial scheme available as an alternative. (App. 17a-18a).

5. In the statutory provisions here, there can be no doubt about the unambiguous clarity of the conditions sought to be enforced. The very words of this statute and their form have been so certified by the Court in *Pennhurst I*. Writing for the Court in *Pennhurst I*, Justice Rehnquist says:

> Indeed, in those instances where Congress has ***intended*** the States to fund ***certain entitlements*** as

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5. *Gonzaga Univ.*, 122 S. Ct. at 2275 (citations omitted), emphasizes that the dispositive question is whether the text of the statute is "'phrased in terms of the persons benefited' . . . 'with an *unmistakable focus* on the benefited class.'" At issue in this case are 42 U.S.C. § 1396a(a)(8) ("furnish . . . to ***all eligible individuals***"); § 1396a(a)(10) ("... ***all individuals*** who are [eligible]"); § 1396d(a)(4)(B) (medical assistance is "early and periodic screening, diagnostic, and treatment services . . . ***for individuals*** who are eligible under the plan and are under the age of 21"); 42 U.S.C. § 1396d(r) (specifying the children's health care and services which are to be furnished to all eligible children). (***emphasis added***).

> a condition of receiving federal funds, ***it has proved capable of saying so explicitly***.

451 U.S. at 17-18 (*emphasis added*).

Pennhurst I immediately continues:

> See, e.g., *King v. Smith*, supra at 333, (Social Security Act creates a "federally imposed obligation [on the States] to ***furnish*** 'aid to families with dependent children . . . ***with reasonable promptness to all eligible individuals***,'" quoting the Act).

Id. (*emphasis added*). The key provision of Title XIX of the Social Security Act, the enforcement of which the Sixth Circuit upheld, provides in its words exactly the same, except here the services are medical assistance: 42 U.S.C. § 1396a(a)(8) says exactly:

> ***medical assistance*** . . . shall be ***furnished with reasonable promptness to all eligible individuals***.

(*emphasis added*). "Medical Assistance" is defined in § 1396d(a)(4)(B) to include "Early and periodic screening, diagnosis and treatment," which in turn is detailed in § 1396d(r).

Pennhurst I and the decision below find these provisions exemplary of non-ambiguity and clarity, providing: "a clear voice, enabl[ing] the states to exercise choice knowingly, cognizant of the consequences of their participation" as required where "Congress intends to impose a condition on the grant of federal moneys." 451 U.S. at 17. *See also King v. Smith*, 392 U.S. 309, 317 (1968).

6. The children's healthcare provisions at issue in the Complaint are mandatory. Once a state chooses to participate in Title XIX, EPSDT is one of five sets of services which the state must provide; the state may elect whether to provide other optional services. *See Harris v. McRae*, 448 U.S. 297, 301-2 (1980) (Stewart, J.):

> Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX. One such requirement is that a participating State agree to provide financial assistance to the 'categorically needy' with respect to five general areas of medical treatment . . . [including] periodic screening and diagnosis of children. . . .'

See also Beal v. Doe, 432 U.S. 438, 440-41 & n.1 (1977) (Powell, J.).

7. There is no comprehensive remedial scheme in Title XIX of the Social Security Act. The *Blessing* Court has unanimously so held: "We have also stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by the availability of administrative mechanisms to protect the plaintiff's interests," including powers to cut off federal funding. 520 U.S. at 347-48 (internal citations omitted).

8. The Sixth Circuit's unexceptional decision that these provisions are enforceable raises no conflicts with other Circuits. On the contrary, these children's healthcare requirements are routinely applied to confer federal rights and to be enforceable under § 1983 by children, their parents and their professional providers. *Bryson v. Shumway*,

No. 02-1059, 2002 WL 31303123, (1st Cir. Oct. 15, 2002) (§ 1396a(a)(8)); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472 (8th Cir. 2002) (§§ 1396a(a)(10), 1396d(a)(4)(B) and 1396d(r)); *Miller by Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993), *vacating*, 816 F. Supp. 505 (W.D. Wis. 1993) (§§ 1396a(a)(8), 1396a(a)(10), 1396d(a)(4)(B) and 1396d(r)); *Ark. Med. Soc'y v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (§§ 1369a(a)(8), 1369a(a)(30)); *Pittman by Pope v. Sec'y of Fla. Dep't of Health & Rehab. Servs.*, 998 F.2d 887 (11th Cir. 1993), *cert. denied, sub nom. Agency for Health Care Admin. v. Pittman by Pope*, 510 U.S. 1030 (1993) (§§ 1396a(a)(10), 1396d(a)(4)(B) and 1396d(r)(5)); *Pereira by Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993), *aff'g*, 805 F. Supp. 361 (E.D. Va. 1992) (§§ 1396b(i)(l) and 1396d(r)(5)); *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983) (§§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B)); *Bond v. Stanton*, 655 F.2d 766 (7th Cir. 1981), *cert. denied*, 454 U.S. 1063 (1981) (§§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B)); *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom., Thornburgh v. Phila. Welfare Rights Org.*, 444 U.S. 1026 (1980) (§§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B)); and *Stanton v. Bond*, 504 F.2d 1246 (7th Cir. 1974), *cert. denied*, 420 U.S. 984 (1975) (§§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B)).[6]

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6. *See also Martin v. Taft*, No. C-2-89-00362, 2002 WL 31101079 (S.D. Ohio Sept. 19, 2002); *Alexander A. v. Novello*, No. 99-CV-8418, 2002 WL 31045299 (E.D.N.Y. Sept. 12, 2002); *Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 205 F. Supp. 2d 1265 (N.D. Okla. 2002); *Memisovski v. Patla*, No. 92 C 1982, 2001 WL 1249615 (N.D. Ill. Oct. 17, 2001); *Antrican v. Buell*, 158 F. Supp. 2d 663 (E.D.N.C. 2001), *aff'd on other grounds sub nom., Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002); *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321 (S.D. Fla. 2001); *Dajour B. v. The City of New*

(Cont'd)

9. Petitioner's arguments disregard settled law or misstate the record. For example, Petitioner, at page 23, asserts that children's healthcare benefits are not individually-enforceable because the statute frames them as elements that must be contained in a state plan. Congress foreclosed this argument in 1994 when it enacted 42 U.S.C. § 1320a-2, overruling a part of *Suter v. Artist M.*, 503 U.S. 347 (1992),

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York, No. 00 CIV. 2044, 2001 WL 830674 (S.D.N.Y. Jul. 23, 2001); *Carr v. Wilson-Coker*, 203 F.R.D. 66 (D. Conn. 2001); *Chisholm v. Hood*, 133 F. Supp. 2d 894 (E.D. La. 2001); *John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001); *Risinger v. Concannon*, 117 F. Supp. 2d 61 (D. Me. 2000); *Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000), *reversed sub nom., Frazar v. Ladd*, 300 F.3d 530 (5th Cir. 2002); *Jeremy and Darvin J. v. Morse*, No. 96-48 (E.D. Ky. Mar. 26, 1997); *Hunter v. Chiles*, 944 F. Supp. 914 (S.D. Fla. 1996); *Sanders v. Lewis*, No. 2:92-0353, 1995 WL 228308 (S.D. W. Va. Mar. 1, 1995); *Wellington v. District of Columbia*, 851 F. Supp. 1 (D.D.C. 1994), *later proceeding at Salazar v. District of Columbia*, 954 F. Supp. 278 (D.D.C. 1996); *G.L. v. Stangler*, 873 F. Supp. 252 (W.D. Mo. 1994); *Chappell by Savage v. Bradley*, 834 F. Supp. 1030 (N.D. Ill. 1993), *opinion clarified by* No. 91 C 4572, 1993 WL 496700 (N.D. Ill. Nov. 24, 1993); *Maher v. White*, No. CIV. A. 90-4674, 1992 WL 122912 (E.D. Pa. June 2, 1992); *Clark v. Kizer*, 758 F. Supp. 572 (E.D. Cal. 1990), *aff'd in relevant part sub nom. Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992), *described in* 60 F.3d 609 (9th Cir. 1988); *Montoya v. Johnston*, 654 F. Supp. 511 (W.D. Tex. 1987); *Woodruff v. Lavine*, 399 F. Supp. 1008 (S.D.N.Y. 1975); *Dominguez v. Milliken*, No. G-198-72 CA (W.D. Mich. Jan. 8, 1973); *N.Y. City Coalition to End Lead Poisoning v. Giuliani*, 720 N.Y.S.2d 298 (N.Y. Sup. Ct. 2000); *contra: Charlie H. v. Whitman*, 83 F. Supp. 2d 476 (D.N.J. 2000) (controlling provisions are not pleaded and not examined and, contrary to *Blessing*, 520 U.S. at 347-49, holding that fund cut off *is* a comprehensive remedial scheme).

to provide that a requirement is not unenforceable by an individual simply because it is articulated as a requirement for the contents of a state plan.

10. Petitioner attempts to create the impression that the allegations in this case are like those in *Blessing v. Freestone*, 520 U.S. 329 (1997): "[r]espondents' only allegations as to Petitioner's actions are that Petitioner submitted statistics to HHS reflecting that Petitioner failed to meet an 80% participation goal set by HHS under 42 U.S.C. § 1396d(r), and that such fact, if true, affords Respondents a right of action. . . ." (Pet. at 24-25). Petitioner's statement twice mischaracterizes the Complaint, which is based on allegations of other statutory provisions, and which does not seek to enforce a participation goal, as such. (App. 145a-176a). Plaintiffs do plead defendant's self reports, uncontradicted, to show the number of children to whom defendants have not furnished children's healthcare. The number of children not served continues to be abysmal.

Although Petitioner tries to shoehorn Title XIX into the mold of the statute at issue in *Blessing* (Pet. at 24, 25-26), they are materially different statutes. The substantial compliance language in Title XIX that is the most comparable to the language at issue in *Blessing* is in § 1396c and entirely and exclusively concerns a Secretary's authority to cut-off federal financial assistance from a state. Respondents here did not sue to enforce § 1396c; instead they sued under provisions which identified specific health care rights for individuals. The *Blessing* Court also went out of its way to make clear that the "substantial compliance" requirement (like the requirement in § 1396c) can co-exist with individually enforceable rights, such as those sought to be enforced here, by sending the case to the district court to

allow plaintiffs to specify which specific rights they sought to enforce. Finally, the Sixth Circuit opinion differs from those of the lower courts in *Blessing*, where this Court complained that the lower courts "did not separate out the particular rights it believed arise from the statutory scheme." 520 U.S. at 345. The Sixth Circuit Court of Appeals *did* address "exactly what rights, considered in their most concrete, specific form, respondents are asserting." *Id.* at 346. (App. 17a-18a, 19a).

11. Petitioner also asserts (Pet. at 25) that notwithstanding this statute which requires the state to furnish children's healthcare to *all* eligible children (*e.g.*, § 1396a(a)(8)), Congress cannot have intended what it said because of a provision requiring the states to report their annual performance of the Secretary to develop and set participation "goals." But goals for administrative purposes are different from the "certain entitlement" to all individuals who are eligible as recognized in *Pennhurst I*, 451 U.S. at 17-18. Congress was moved in 1989 to secure administrative goals, not to dismiss or repeal that entitlement. It hoped to improve through administrative action performance which was widely perceived as unsatisfactory.

12. Petitioner suggests (Pet. at 26) some possible conflict between the decision in this case and the Fifth Circuit's opinion in *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002). But *Frazar* is ill-developed and unripe for review here. *Frazar* was about a six-year old settlement agreement. Although agreeing that the case arose under *Ex parte Young*, the Fifth Circuit panel nonetheless held that the district court did not have jurisdiction to enforce a consent decree if the provisions of the decree were not, themselves, directly enforceable under § 1983.

The Fifth Circuit did not mention or in any way address three of the children's healthcare provisions on which the Sixth Circuit of Appeals grounded its decision, §§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B). (App. 17a-18a). The *Frazar* district court opinion appears not to have rested in these provisions. Indeed, *Frazar* expressly reaffirms the continued vitality of *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983), a children's dental care case where the Circuit had enforced §§ 1396a(a)(8), 1396a(a)(10) and 1396d(a)(4)(B) and (5), as well as 42 C.F.R. § 441.56 which is now codified as § 1396d(r), all statutes relied upon in this case; and *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000), in which it held the equal access clause of § 1396a(30)(A) to confirm individual benefits and hence be enforceable by eligible children under § 1983. *Frazar*, 300 F.3d at 539-40.

Finally, *Frazar* recites that plaintiffs' Complaint included a claim that defendants "did not meet annual participation goals set by the Secretary." *Id.* at 534. As discussed above, Respondents did not make these allegations. The Fifth Circuit appeared to rely heavily upon the presence of this claim in likening it to the provision held unenforceable in *Blessing*. *Frazar*, 300 F.3d at 544-45. Thus, while the holdings of the Fifth Circuit may conflict with other holdings in other circuits, any conflict with the holding in this case is murky, at best, and does not warrant further review of this case.

13. Petitioner claims a single error with respect to the Court of Appeals' holding that the American Academy of Pediatrics, Michigan Chapter and the American Academy of Pediatric Dentists have standing. But Petitioner's bare assertion that it agrees with the district court as to prudential standing (Pet. at 20) does not warrant review here. Nor does any other consideration.

14. The district court itself assumed that the two professional provider organizations had constitutional standing. (App. 106a). This was an unexceptional conclusion given this Court's decisions since *Hunt v. Wash. Apple Adver. Com'n*, 432 U.S. 333 (1977) and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Under *Hunt*, since members of the Michigan chapters of pediatric academies have standing under § 1396a(a)(30)(A) (". . . assure that payments . . . are sufficient to enlist enough providers . . ."), (H. Rep. No. 1024-7 at 390; 1989 U.S.C.C.A.N. at 2116 (codified as an incentive to physicians)), so do their organizations. *See, e.g., Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993), (*citing Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 (1990)). Under *Havens*, the professional organizations also have standing because Petitioner's violations have imposed otherwise unnecessary expenditures to "protec[t] the medical needs of children" and to "promot[e] policies that increase access to healthcare for low-income children" upon the Academies themselves. (App. 153a-154a). Those elements satisfy also the flexible standards of prudential standing. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Moreover, this case is not a suitable vehicle for review because it must go forward in any event given the unchallenged standing of the individual children, their families and their organizations.

CONCLUSION

Nothing in the unexceptional decision of the unanimous Court of Appeals for the Sixth Circuit warrants review by this Court. The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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